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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CLRB HANSON INDUSTRIES, LLC d/b/a INDUSTRIAL PRINTING, and HOWARD STERN, on behalf of themselves and all others similarly situated, Plaintiffs, vs. GOOGLE, INC., Defendant.	CASE NO: C05-03649 JW **DECLARATION OF MICHELE F. RAPHAEL IN OPPOSITION TO DEFENDANT GOOGLE INC.'S ADMINISTRATIVE MOTION FOR LEAVE TO FILE DOCUMENTS UNDER SEAL IN CONNECTION WITH GOOGLE INC.'S OPPOSITION TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PARTIAL SUMMARY JUDGMENT** Civ. L.R. 7-11 Civ. L.R. 79-5 Courtroom: 8 Judge: Hon. James W. Ware

Dockets.Justia.com

I, **MICHELE F. RAPHAEL**, declare as follow:

1. I am a member of Wolf Popper LLP, counsel for Plaintiffs CLRB Hanson Industries, LLC d/b/a Industrial Printing and Howard Stern (collectively, “Plaintiffs”) in this action against Google, Inc (“Google”). I have personal knowledge of the facts stated herein. I submit this declaration in opposition to Defendant Google Inc.’s Administrative Motion for Leave to File Documents Under Seal in Connection with Google Inc.’s Opposition to Plaintiff.

2. Defendant seeks to file its Opposition to Plaintiffs’ Supplemental Memorandum in Support of Partial Summary Judgment (“Defs. Supp. Opp. Mem.”) entirely under seal and Exhibits A, B, C, F and G to the Supplemental Declaration of M. Christopher Jhang in Support of Google Inc.’s Opposition to Plaintiffs’ Supplemental Memorandum in Support of Partial Summary Judgment (“Supp. Opp. Jhang Decl.”) (collectively, “Supp. Opp. Filings”) under seal, largely because those documents and exhibits contain, or refer to the deposition transcripts of Messrs. Schulman and Venkataraman which Defendant has improperly designated as confidential in their entirety.

3. Plaintiffs have objected to Defendant’s blanket designation of the transcripts of Messrs. Schulman and Venkataraman as improper and contrary to the Protective Order entered on May 15, 2007. Paragraph 4 thereof explicitly prohibits blanket, en masse designations without regard to the specific contents of each document or piece of information. Illustrative of the impropriety of Defendant’s blanket confidential designation is that testimony of the witnesses concerning their preparation for their deposition, whether they were asked to provide documents with respect to this case, their educational background, their employment history, their titles and physical location of their offices at Google, and questions concerning Ms. Schulman’s Declaration which was publicly filed, have all been marked confidential. This is just illustrative, and not an exhaustive reiteration of the testimony that has been improperly designated confidential. Plaintiffs have requested that Defendant provide good faith designations, which it has not done.

4. Defendant has failed to demonstrate good cause to justify the filing of the

aforementioned documents under seal. Little, if any, information qualifies as confidential material as per the Protective Order. Defs. Supp. Opp. Mem. discusses/argues what the sign-up process was when Plaintiffs' enrolled, whether the terms of the purported Adwords Agreement excludes paused days from the calculation of daily budget times the number of days in a month and whether Plaintiffs are legally entitled to recover on an unjust enrichment theory. Indeed, much of the brief concerns the publicly available Frequently Asked Questions ("FAQs"). There is little (if anything), in Defs. Supp. Opp. Mem. which may be properly withheld from the public record.

5. The same holds true for the exhibits to the Supp. Opp. Jhang Decl. which Defendant wants to keep from the public. Exhibit A are excerpts from the transcript of Mr. Schulman. The first pages thereof discuss Mr. Schulman's educational and employment history and little, if anything, on the remaining pages may be properly sealed. Defendant likewise requests that Exhibit B, excerpts from the transcript of Mr. Venkataraman, be filed under seal, again, because it improperly designated the entire transcript as confidential - not because it contains confidential material as per the Protective Order nor Fed. R Civ. Pro. 26. Defendant's request to file under seal the excerpts from the deposition transcript of Ms. Wilburn, Exhibit C, is extremely troubling. Of the 7(seven) pages of testimony attached, only 2(two) even contain any lines designated by Defendant as confidential. The few lines on those 2 pages (whether properly designated or not) need only be redacted. Also annexed in Exhibit C is the page which Defendant claims evidences the click to accept screen on its site when Plaintiffs enrolled. That is clearly not confidential. As for the two remaining exhibits, F and G, those contain documents produced by Google prior to Ms. Wilburn's deposition and have been represented to be internal training documents. While not admitting that they deserve a confidential designation, Plaintiffs do not object to those documents being filed under seal.

6. Defendant should make a good faith effort to designate as confidential only those portions of Defs. Supp. Opp. Mem. and only those exhibits, or portions of exhibits, annexed to the Supp. Opp. Jhang Decl. which properly qualify as confidential pursuant to the Protective

Order and Fed. R. Civ. Pro. 26 (c). Then, if, and to the extent, Defendant continues to maintain that it is necessary to file under seal any portion of Defs. Supp. Opp. Filings, such request should be narrowly tailored to keep from the public record only those portions which constitute trade secrets, proprietary information, and/or confidential information, which, if not sealed and permitted in the public record, would prejudice Google or cause Google to suffer irreparable harm.

Dated: May 24, 2007

/s/
Michele F. Raphael